

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a
Corporation,

Defendant in Error.

Transcript of Record.

DESIGNATED BY COUNSEL FOR DEFENDANT
IN ERROR.

Upon Writ of Error to the United States District
Court of the Eastern District of Wash-
ington, Southern Division.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

AT LAW—No. 3587.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

**Affidavit of Edward J. Cannon in Support of Appli-
cation for Order for Printing Additional Tran-
script of Record.**

State of Washington,
County of Spokane,—ss.

EDWARD J. CANNON, being first duly sworn,
says: That he is one of the attorneys for the defend-
ant in error in the above-entitled action; that the
plaintiff in error in said cause now contends that the
defendant in error and the Northern Pacific Benefi-
cial Association were both negligent in the employ-
ment of the surgeons and assistants to said surgeons
who operated on the plaintiff in error and cared for
him; that plaintiff in error has omitted from his
transcript of record all testimony relating to that
subject; that he has also omitted from said tran-
script his stipulation and admission made upon the
trial that no claim was made that any surgeon or
assistants thereto were in any way incompetent; that
it now becomes important, in order that the Court

of Appeals may have before it the stipulations, admissions and evidence which justified the court below in granting defendant in error's (then defendant) motion for a directed verdict, that same shall be printed, and this application is made for the purpose of securing an order for the printing of the stipulations, admissions and evidence following:

The cross-examination of the plaintiff beginning at the bottom of page 28 and extending to line 15 on page 33 of the Statement of Facts;

That portion of the cross-examination of Dr. O'Brien contained on page 57 of said Statement;

That portion of the testimony of William A. Laidlow beginning on page 91 and ending on line 9 of page 95 thereof; and that portion of said testimony beginning at line 23, page 96, and ending at line 14, page 97;

That portion of the testimony of J. J. Maher beginning at line 15, page 98, and on to the bottom of said page, and beginning at line 15, page 99, and ending with "Witness excused";

That portion of the testimony of the witness Benton beginning at line 1 and ending at line 17, page 105, and beginning at line 1 and ending at line 25, page 106;

That portion of the testimony of Dr. S. W. Mower, beginning at line 12 and ending with line 25, page 107, and beginning at line 8 and ending at line 16, page 108, and

Memorandum of Court below of September 21st, 1920.—under and pursuant to Rule 23 of the Rules of the United States Circuit Court of Appeals, and in ac-

cordance with paragraph 1395 of Barnes' Federal Code of 1919.

EDWARD J. CANNON.

Subscribed and sworn to before me this 14th day of January, 1921.

[Seal] ORVILLE W. DUELL,
Notary Public for Washington, Residing at Spokane,
Washington.

[Endorsed]: No. 3587. United States Circuit Court of Appeals for the Ninth Circuit. James E. Carr, Plaintiff in Error, vs. Northern Pacific Railway Co., a Corporation, Defendant in Error. Affidavit of Edward J. Cannon, in Support of Application for Order for Printing Additional Transcript of Record. Filed Jan. 18, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the
Ninth Circuit.

AT LAW—No. 3587.

JAMES E. CARR,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant in Error.

**Order Granting Application of Defendant in Error
for Printing of Additional Transcript of
Record.**

It appearing to the Court that the Transcript of

Record printed in the above-entitled action and filed in this court does not contain the stipulations, admissions and testimony made and introduced upon the trial of the cause which are important and necessary for the Court of Appeals to have before it in considering the questions now raised by the plaintiff in error herein and defendant in error, it is therefore—

ORDERED, That an additional Transcript of Record be printed and filed in said cause in this court of Appeals, containing the following portions of the record upon the trial:

The cross-examination of the PLAINTIFF beginning at the bottom of page 28 and extending to line 15 on page 33, of the Statement of Facts; That portion of the cross-examination of DR. O'BRIEN contained on page 57 of said Statement;

That portion of the testimony of WILLIAM A. LAIDLOW beginning on page 91 and ending on line 9 of page 95 thereof; and that portion of said testimony beginning at line 23, page 96, and ending at line 14, page 97;

That portion of the testimony of J. J. Maher beginning at line 15, page 98, and on to the bottom of said page, and beginning at line 15, page 99, and ending with "Witness Excused."

That portion of the testimony of the witness BENTON beginning at line 1 and ending at line 17, page 105, and beginning at line 1 and ending at line 25, page 106;

That portion of the testimony of DR. S. W. MOWER beginning at line 12 and ending with line 25, page 107, and beginning at line 8 and ending at line 16, page 108; and memorandum of Court of September 21st, 1920.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3587. United States Circuit Court of Appeals for the Ninth Circuit. James E. Carr, Plaintiff in Error, vs. Northern Pacific Railway Co., a Corporation, Defendant in Error. Order Granting Application of Defendant in Error for Printing of Additional Transcript of Record. Filed Jan. 18, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Excerpt from Cross-examination of James E. Carr.

Q. When you entered the service of the Northern Pacific you understood, did you not, that the employes of the Northern Pacific Railway were members of an organization known as the Northern Pacific Beneficial Association? [28]

A. Well, I signed something to that effect, I believe, in the application.

Q. Well, I will read at this time a portion of the exhibit, which is Exhibit "A." "21. Do you understand that you are required to become a member of the Northern Pacific Beneficial Association upon entering the service of the Northern Pacific Railway, and do you assent to that Association' rules and

(Testimony of James E. Carr.)

monthly deductions from your salary for this purpose? Yes.” You remember writing the word “Yes” in your application? A. Yes, sir.

Q. Now, at that time I believe Mr. Shannon was trainmaster, was he not? A. Yes, sir.

Q. And he examined you also on the Book of Rules? A. Transportation rules.

Q. And the transportation rules of the Northern Pacific are contained in a book that you trainmen carry with you, do you not?

A. We did at times; we had access to them.

Q. And it was incumbent upon you and it was your duty, and you did study those rules?

A. I studied those rules.

Q. I call your attention to a book marked Defendant’s Exhibit “B” and to page 145 of that book, and ask you if that is the Beneficial Association to which you refer. A. I believe it is.

Q. What? A. Yes, sir.

Q. You were familiar with those rules, were you not, when you joined the company’s employ?

A. Not when I joined them, but after I joined them.

Q. Quite soon afterwards? [29]

A. We aren’t furnished one of those books until after we are employed.

Q. But anyway, between 1908 and prior to 1913, you did become familiar with them?

A. I did become familiar with them; yes, sir.

Q. Your monthly dues were paid from time to time? A. They were deducted.

Mr. CANNON.—I offer page 145 in that book, and

(Testimony of James E. Carr.)

that will cover pages, 146, 147 and 148, down to "First Aid to the Injured."

Mr. JOHNSON.—There is no objection.

WHEREUPON, said pages 145, 416, 417 and 148 of book marked Defendant's Exhibit "B" for Identification, were admitted in evidence and are hereto attached and made a part hereof.

Mr. CANNON.—Q. Now, turning to the Northern Pacific Beneficial Association Constitution and By-laws which have been introduced in evidence. You became familiar also with these? A. No, sir.

Q. Well, let's see if you didn't. From year to year the officers of the Beneficial Association were elected, were they not? A. Yes, they were elected.

Q. One man from the conductors?

A. A representative from each organization; yes, sir.

Q. And you helped elect them, didn't you?

A. Yes, sir.

Q. That is, you voted from year to year to elect the officers?

A. Sometimes I voted and sometimes I didn't.

Q. And every year you voted as to whom should be elected as officers of that association? A. Yes, sir.

Q. So that you were quite familiar with the fact that the employees of the Northern Pacific were all members of the Northern [30] Pacific Beneficial Association?

A. Well, the way I understood it there was a representative of our organization to the association.

(Testimony of James E. Carr.)

Q. You knew there was also a representative of the engineers and firemen?

A. Every branch had a different representative.

Q. Shopmen and trackmen. A. Trackmen.

Q. General office employees.

A. I don't know anything about those.

Q. As well as conductors and brakemen?

A. Conductors and brakemen I know.

Q. Mr. Carr, this Dr. Johnson that you speak of in Toppenish was one of the surgeons of the Northern Pacific Beneficial Association, was he not?

A. Well, we always classed them as Northern Pacific doctors, that is the way we call them.

Q. But that is the fact, he was the doctor for the Beneficial Association?

A. That is what they say, "Northern Pacific doctor"; I don't know.

Q. And Dr. O'Brien, until he left the service, was so engaged? A. So engaged.

Q. And Dr. Mowers in charge of the hospital in Tacoma was so engaged? A. Yes, sir.

Q. And all of the others, Dr. Argue and Bell and all of them? A. I presume so; yes.

Q. That hospital that you speak of in Tacoma is the Northern Pacific Beneficial Hospital where all you men went when you were hurt or sick?

A. Why, some of them didn't go. [31]

Q. Well, they could if they wanted to; that is true, isn't it?

A. Yes, that is true; they had the option of going.

(Testimony of James E. Carr.)

Q. And they paid for it by deductions out of their salary? A. Yes.

Q. And that association, you know, was and is a corporation?

A. Well, all I know is just what they say. I never paid much attention to it. I know we had to pay the benefits; they was deducted.

Q. And the Northern Pacific Beneficial Association selected its doctors; you know that, don't you?

A. I don't know who selected the doctors.

Mr. CANNON.—Then I will offer in evidence the Constitution and By-laws, not only the part read by counsel or marked by counsel, but the entire book.

The COURT.—Very well.

Mr. JOHNSON.—As to that we make the objection that it is incompetent, irrelevant and immaterial. If there was no relationship existing between him and the Beneficial Association it is entirely immaterial, and that is the ground of my objection.

The COURT.—I will admit it upon the ground that you offered a part.

Mr. CANNON.—Q. Mr. Carr, you went to the hospital, you say, in 1913; do you remember who directed you to go?

A. Dr. H. M. Johnson of Toppenish.

Q. And then you had appendicitis?

A. Appendicitis.

Q. The operation was performed by whom?

A. Dr. Mowers.

Mr. CANNON.—Is it claimed, Counsel, that Dr. Mowers isn't a competent surgeon?

(Testimony of James E. Carr.)

Mr. JOHNSON.—No, sir. [32]

Mr. CANNON.—Or Dr. Argue?

Mr. JOHNSON.—No, sir.

Mr. CANNON.—Or Dr. Bell?

Mr. JOHNSON.—I don't know of Dr. Bell.

Mr. CANNON.—Is there any claim that the hospital surgeons were incompetent?

Mr. JOHNSON.—No, I don't think I have alleged they are incompetent.

The COURT.—Under the allegations of the complaint there are three acts of negligence charged; one refers to the operating surgeon, who was Dr. Mowers, the second also refers to the same practically, and the third refers to the removal of the bandages.

Mr. JOHNSON.—In other words, it is an action for negligence and not one for incompetence or anything of that kind. [33]

Excerpts from Cross-examination of Dr. H. B. O'Brien.

Q. You were attempting to correct your testimony relative to Dr. Mowers. Is it not a fact that the time he examined the plaintiff at the office of yourself and your partner, that you testified to yesterday as being in 1918?

A. I think I was wrong; I think it was probably 1916 or 1917.

Q. It was prior to 1918? A. Yes.

Q. And during the time you were one of the surgeons under him? A. Yes, it was.

Q. You came out west as an interne in the Associa-

(Testimony of Dr. H. B. O'Brien.)

tion Hospital at Tacoma? A. I did.

Q. And after serving there awhile you located in Pasco? A. Yes.

Q. Is it not a fact that Dr. Mowers named you as local attorney at Pasco? A. Yes, sir.

The COURT.—He so testified.

Q. When you were employed as such surgeon you were familiar with the constitution and by-laws of Northern Pacific Beneficial Association?

A. Not all of them; I read them when I first went over there I think, that was all.

Q. You understood it to be a fact that the contributions of these men from month to month is turned in afterwards to the Northern Pacific Beneficial Association? A. I think so.

Q. Turned over by the Railway Company to the Association? A. Yes, sir. [57]

Excerpts from Testimony of William A. Laidlow, for Defendant.

WILLIAM A. LAIDLOW, having been called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination.

Q. State your full name?

A. William A. Laidlow.

Q. How old are you? A. Fifty-six.

Q. What is your business?

A. Secretary of the Northern Pacific Benevolent Association.

Q. How long have you been such secretary?

(Testimony of William A. Laidlow.)

A. Twenty-six years.

Q. In other words, you have been connected with that Association practically since its inception?

A. No, it was in existence ten or fifteen years prior to that.

Q. As secretary you have charge of the books of that association and of its records? A. Yes.

Q. Can you refer to the record for the year 1913 at the time this gentleman was operated on in the hospital? A. Yes.

Q. You also print these records and mail them out each year? A. Yes, sir.

Q. I hand you a book which is called the Thirty-first Annual Report of the Northern Pacific Benevolent Association for the year 1913, and ask you if that is one of the books published by your Association.

A. Yes, we issue several thousand of these and they are issued over the entire line. [91]

Q. What period is covered?

A. Fiscal year ending June 30, 1913.

Q. One year? A. Yes.

Q. And these reports are delivered to the men and officials and all that?

A. For general information of all.

Mr. CANNON.—I want to have that marked.

Q. Mr. Laidlow, that is taken from the original records of the company? A. Yes.

Q. And is a true copy? A. Exact copy.

Q. What kind of an Association is this Northern Pacific Benevolent Association?

A. Voluntary Co-operative Association, taking care

(Testimony of William A. Laidlow.)

of the men, giving them medical and hospital care. Furnishes benefits in a great many cases.

Q. How much of it is shown by the by-laws?

A. The only thing is now shown in that book it does not show that all collections made from the men that every penny goes to this association.

Q. Can bring that out by questions. What is the fact?

A. These payments by the men are collected by the Railroad Company and turned over to the Association and from that fund are paid the expenses of the hospitals the salaries of the local surgeons and all other expenses for care of the men. [92]

Q. Does the Railway Company take or derive any of the money?

A. Absolutely none. Makes collections without any charge; provided in the beginning with hospitals at Missoula and —, and provides transportation and assists in a great many ways in making this a success where it would probably show a deficit each year.

Q. And the N. P. also gives some funds?

A. In addition to that the N. P. Ry. contributed \$25,000.00 a year. To-day they give \$50,000.00.

Q. Never derive any benefit?

A. Never received any compensation from the association.

Mr. JOHNSON.—This is objected to as calling for a conclusion.

Mr. CANNON.—Question of fact.

Q. Receive any money from it? A. None.

(Testimony of William A. Laidlow.)

Q. Where do you get your money, from—where does it reach you?

A. Money is collected by the Railway Company by deducting from the payrolls and Mr. Myers gives me a statement every month of the statement so collected at his office, makes a check for that amount payable to the Association which is turned over to our treasurer and placed in that fund. I have the original reports of Mr. Myer for that year.

Q. Then this is a duplicate original of the report?

A. That is the original itself made that year.

Q. Shows all the moneys collected and paid in to the Association? A. Yes, sir.

Q. And all of it appears to have been turned over. And these are the original records showing that fact?
[93] A. Yes, sir.

Mr. JOHNSON.—There is no dispute about that.

Q. How are the managers elected?

A. Elected by popular vote. At that time every two years. Now they are elected every four years.

Q. And from what different branches are the managers elected?

A. From the various branches of the service; conductors, brakemen and so on down.

Q. I will ask you then another general question, who selects the surgeons along the line?

A. The chief surgeon.

Q. Who was he then?

A. At that time Dr. Mowers.

The COURT.—How is he selected?

A. By the President and Board of Managers of the

(Testimony of William A. Laidlow.)

Association. And he selects his subordinates.

Q. Does the N. P. have anything to do with his selection? A. Nothing.

Q. Or any of his employees?

A. Nothing whatever.

Mr. CANNON.—I will offer in evidence Defendant's Exhibit "F" for identification which contains more in detail the information which the witness has testified to.

Mr. JOHNSON.—Objected to.

Overruled. [94]

Q. Mr. Laidlow, this report (Defts. Ex. "F"), that you have referred to here, is made up by the Northern Pacific Railway Company; not only a report of moneys collected but a complete report of what?

A. Refers to funds received from employees of the general office and operating department on the Eastern District Yellowstone, central and western districts—moneys deducted from employees at the various points in those districts.

Cross-examination.

Q. It does not show the amount contributed by the N. P. Ry. Co.?

A. No, simply the amounts deducted by the employees. [95]

A. No.

(Witness excused.) [96]

Q. Is it or is it not a fact that all of the officers of the Northern Pacific Benevolent Association are officials of the Northern Pacific Railway Company?

A. At that time there were four of them.

(Testimony of William A. Laidlow.)

Q. Who were they?

A. President, vice-president, comptroller and secretary-treasurer.

Q. For whom did you work prior to entering the service of the Northern Pacific Benevolent Association?

A. I was in the purchasing department of the N. P. Ry Co.

Q. Assuming now that someone not an employee of the railway company, is injured in a wreck along the line, who takes care of that injured person?

A. The claim department. [97]

Excerpts from Testimony of J. J. Maher, for Defendant.

Q. Do you know if it is a fact that all the moneys collected from the employees, after deducting from their pay, is turned over to the Association?

A. It is.

Q. You hold receipts for it all from the Association? A. I do.

Q. And that has been and was the fact during 1913 and ever since? A. It is.

Q. Does the Northern Pacific Ry. Co. receive a dollar of profit out of these moneys?

A. No, sir.

Q. Does it even charge for keeping a record of it?

A. It does not.

Q. Turned over fully without deducting their charge? A. Yes. [98]

A. We started in, I believe, with \$15,000.00 and the

(Testimony of J. J. Maher.)

Association was running behind and on a showing made the President increased it from time to time. It was increased from time to time according to the requirements of the Association.

Q. And the amount deducted from the employees has increased?

A. Increased very little. Increased and decreased.

(Witness excused.) [99]

Excerpts from Testimony of Mr. Benton, for Defendant.

Mr. BENTON, having been called as a witness on behalf of defendant and having been duly sworn, testified as follows:

Direct Examination.

Q. You are claim agent for the N. P. Ry?

A. Yes, sir.

Q. Your son is also claim agent for the company?

A. Yes, sir.

Q. What is the fact as to whether or not the N. P. Benevolent Association surgeons when employed to treat strangers are paid for the services performed on these strangers?

A. Within my experience they have always been paid in every instance where they have rendered services and made a report and made a bill, get paid for those services—the Railway Company pays. [105]

A. Dr. Willis.

Q. As a member of the N. P. B. A?

A. He is.

(Testimony of Mr. Benton.)

Q. When was he appointed?

A. A good many years ago. Paid him because the case was settled.

Q. And taken out of the settlement of the man that was injured? A. No.

Q. That is not a fact? A. No.

Q. What arrangement have you with the surgeons along the line for separate payment for treating strangers?

A. Don't know of any arrangement. It is the practice.

Q. You don't know that it is done in all cases?

A. I know what is done in my case and what I have observed other claim agents do.

The COURT.—The surgeons appointed by this association are under no obligations to treat strangers?

A. Not that I know of.

Q. Why do you take strangers to the company doctor if they show preference to other doctors?

A. We don't. [106]

Excerpts from Testimony of Dr. S. W. Mowers, for Defendant.

Direct Examination.

Q. When you were chief surgeon of the Northern Pacific Benevolent Association hospital at Tacoma, who hired you?

A. Northern Pacific Benevolent Association.

Q. Who paid you? A. Same association.

Q. Were you ever employed by the Northern Pa-

(Testimony of Dr. S. W. Movers.)

cific Railway in connection with that hospital?

A. No, sir.

Q. The employees under you at that time, who hired them? A. I did the hiring of them.

Q. Who paid them?

A. Northern Pacific Benevolent Association.

Cross-examination. [107]

Q. Do you know if the amount deducted from the employees and the Northern Pacific Ry. is sufficient to pay all expenses or insufficient—the amount plus what they get from the Railway Company?

A. More than sufficient just now.

Q. And if more than sufficient it is used toward building hospitals? A. Yes, sir.

(Witness excused.) [108]

